7 October 1947

MEMORANDUM FOR THE GENERAL COUNSEL

Subject: Congressional Privilege and Immunity.

1. The Executive for Inspection and Security (in draft memorandum, dated 30 September 1947, subject: Release or Disclosure of Classified or Unclassified CIA Intelligence or Information to the Congress of the United States) has suggested (par. 4(f) of reference memorandum) that all classified material released to a Member of Congress carry appropriate cautionary notices to preclude unauthorized dissemination. Phrases suggested in reference memorandum include:

(a) "This document is furnished for use of the recipient only. Reproduction, quotation, or further dissemination is not authorized without specific authority of the Director of Central Intelligence."

(b) "This document contains information affecting the national defense of the United States within the meaning of the Espionage Act, 50 USC 31 and 32, as amended. Its transmission or the revelation of its contents in any manner to an unauthorized person is prohibited by law."

2. The following conclusions are reached:

(a) Any Member of Congress may make any statement he desires on the floor of the Congress or in one of its committees. This statement may be reprinted in the Congressional Record or in committee hearings.

(b) Such a statement is absolutely privileged, regardless of whether the statement includes classified CIA material or not, and regardless of any words of limitation which may accompany the material.

(c) Use of classified CIA material for speeches or writings outside of Congress (press, radio, public addresses, etc.) is not a privileged use, and would subject Member to prosecution under the espionage laws.

(d) Constitutional immunity will not protect a Member from prosecution for commission of a felony, provided it does not come within the terms of paragraph 2 (a), above.

(e) That prosecution of a Member for unauthorized disclosure of classified CIA material is very unlikely.

3. The following recommendations are made:

(a) The proposed phraseology in paragraph 1 (b), is preferable and should accompany all documents classified higher than RESTRICTED when transmitted to the Congress.

(b) Whenever possible, when CIA intelligence material of classification higher than RESTRICTED is transmitted to a Member, it should be explained to the Member that the material is classified and that unauthorized disclosure would be unfortunate in the interests of national security.

L. Pforsheimer

7 October 1947.

MEMORANDUM OF LAW

I. Congressional immunity for statements made in Congress.

Article 1, §6 of the Constitution states in regard to Senators and Representatives that:

> "...for any Speech or Debate in either House, they shall not be questioned in any other Place."

In the case of Coolrun v. Cousens, 42 F (2d) 753 (Court of Appeals, District of Columbia, 1930; cert. den. 282 U.S. 874) it was held that this provision was grounded on public policy and should be liberally construed. In this case, the plaintiff charged Senator Cousens of Michigan with uttering defamatory words in a speech on the Senate floor. Inasmuch as the speech was made on the Senate floor, it was held to be absolutely privileged and not subject to "be questioned in any other place." The averment that the words were not spoken in the discharge of the Senator's official duties was held to be entirely qualified by the averment that they were uttered in the course of a speech on the Senate floor. In this connection, the court stated (Robb, J, at p. 754):

> "It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted unlimited freedom in speeches or debates. The provision to that end is, therefore, grounded on public policy, and should be liberally construed."

The court in the Cousens case, supra, held that the case of Kilbourn v. Thompson, 103 U.S. 168 (1880) was controlling. In this case, the question at issue was whether a resolution offered by a Member of Congress is a speech or debate within the meaning of Article 1, §6, and whether the report made to the House and the vote in favor of a resolution are within its protection. In this connection, the Court (per Mr. Justice Miller) stated:

> "It would be a narrow view of the Constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting...In short, to things generally done in a session of the House by one of its members in relation to the business before it." (at p. 204).

From the above, together with the positive phrasing of Article 1, §6 of the Constitution, it would appear incontrovertible that any Member may make any statement he desires on the floor of the Congress or in one of its committees. Such statement shall be absolutely privileged, notwithstanding that it was based on information secured from classified Central Intelligence Agency material either furnished the Member in confidence or containing any restrictive notice as to use or dissemination. This privilege would operate if the Member were to read the information verbatim into the record on the floor or into the record of hearings before a Congressional Committee. It would still be privileged when it appeared, verbatim, in the Congressional Record or in the published hearings of a Congressional Committee.

From the above, it is apparent that, while phrases calling attention to sections of the espionage laws might serve as a warning to conscientious legislators, they have no force and effect in the above connection.

Scant comfort can be gained from dicta in the Cousens case, supra, which states:

> "Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues. Article 1 §5." (at p. 784).

II. Congressional immunity for statements made outside of Congress.

While the privileges and immunities outlined in Point I, above, extend "to things generally done in a session of the House by one of its Members in relation to the business before it," they do not appear to extend to the activities of the Members of both Houses when not in session. Thus, it would not be proper for a Member to circulate CIA documents to his constituents, to the press, or by reading to a meeting or over a radio — providing the proposed notices or limitations had been brought home to the Member by printing on the copies. Failure to observe the limitation in this connection would well make the Member liable for prosecution under the espionage laws.

This point was touched upon in the celebrated case of Long v. Ansell, 69 F (2d) 386 (Court of Appeals of the District of Columbia, 1934) which was an action by Senator Huey Long of Louisiana, to quash a service of process upon him in a libel suit. Senator Long uttered the libel in a speech on the floor. Following this, however, he sent the defamatory matter to Louisiana in the form of reprints of the Congressional Record. In dicta, (which was not referred to by the Supreme Court in affirming the decision, 293 U.S. 76 (1934)), Van Orsdel, J., stated:

> "While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circularizing of the libelous documents." (at p. 389).

III. Immunity of Members of Congress from arrest or service of process.

Article 1, §6 of the Constitution states in regard to Senators and Representatives that:

> "They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same."

It is apparent that the expression "treason, felony...." excepts from the operation of the privilege all criminal offenses; the privilege applies only to arrests in civil suits. It does not include immunity from service of process in civil or criminal cases.

This is supported by the case of Long v. Ansell, 293 U.S. 76 (1934), which was brought by Senator Huey Long to quash service of summons upon him in a libel action. Senator Long contended that the Constitution confers upon every Member of Congress, while in attendance within the District, immunity in civil cases not only from arrest, but also from service of process. Mr. Justice Brandeis stated that:

> "Neither the Senate, nor the House of Representatives, has ever asserted such a claim in behalf of its members. Clause 1 defines the extent of the immunity. Its language is exact and leaves no room for a construction which would extend the privilege beyond the terms of the grant.... History confirms the conclusion that the immunity is limited to arrest .... When the Constitution was adopted, arrests in civil suits were still common in America. It is only to such arrests that the provision applies." (at p. 82).

In support of this, the Court in the Long case cited Williamson v. United States, 207 U.S. 425 (1908). This case involved an objection taken by a Member of Congress that he cannot be sentenced during his term of office on the ground that it would interfere with his Constitutional privilege from arrest. Mr. Justice White stated:

> "... It follows that the terms treason, felony and breach of the peace, as used in the Constitutional privision relied upon, excepts from the operation of the privilege all criminal offenses, the conclusion results that the claim of privilege of exemption from arrest and sentence was without merit." (at p. 446).

From this it would appear that should a Member commit a crime under the conditions set forth in Point II, above, he would be liable to service of process, arrest, and prosecution. This would certainly make him liable under the espionage laws. For this reason, therefore, it is felt that a Member should be put on notice when in receipt of CIA material, that unauthorized disclosure would make him liable to prosecution under the espionage law.

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